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No. 07-688

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IN THE SUPREME COURT OF THE UNITED STATES

GREGORY D. BOLIN, *Petitioner,*

v.

E.K. McDANIEL, WARDEN OF ELY STATE PRISON

THE STATE OF NEVADA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether admission of prior bad act evidence under state law to show an emotional propensity for sexual aberration in a sexual assault trial violates federal due process when such evidence was also properly admitted for other purposes such as identity?

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STATEMENT OF THE CASE

In 1996, Gregory Bolin was charged and convicted following a jury trial of first degree kidnapping, sexual assault and first degree murder of Brooklyn Ricks. Upon the jury's finding of several aggravating circumstances at a penalty hearing, Bolin was sentenced to death for the murder charge.

Petitioner raises the current issue concerning bad act evidence in the context of a request for certiorari review of the Nevada Supreme Court's Order filed June 22, 2007, affirming the trial court's denial of post-conviction relief. Petitioner's Appendix A. Previously, on direct appeal the Nevada Supreme Court held that because the bad act evidence was properly admitted to show identity, it was unnecessary to consider whether the evidence was improperly admitted to show a propensity for sexual aberration. Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998) *cert. denied*, Bolin v. Nevada, 525 U.S. 1179, 119 S.Ct. 1117 (1999) (No. 98-7042).

Upon Nevada's subsequent disavowal of the sexual aberration exception in 2002, Bolin again raised the issue in state post-conviction proceedings due to the intervening change in state law and on grounds of ineffective assistance of counsel. In affirming denial of post-conviction relief, the Nevada Supreme Court held that even if the change in state law were retroactively applicable to Bolin's case, the evidence would have still been admissible to show identity and

any error was harmless in light of the weight of evidence supporting Bolin's conviction. See Petitioner's Appendix at p. 3a.

STATEMENT OF FACTS

A. The Kidnapping, Sexual Assault, and Murder of Brooklyn Ricks

In July of 1995, Brooklyn Ricks and her husband Kerry, were living with Brooklyn's sisters, Liberty Wilson and Brittaney Lewis. Brooklyn, Liberty and Brittaney all worked at the B & R Video Store which was located in a strip mall occupied by various small businesses and an Albertson's supermarket.

On July 14, 1995, Brooklyn agreed to work an extra two hour shift for her sister, Liberty. At 9:45 p.m. Brooklyn left her home in a 1974 gray-spotted Chevy half-ton pick-up truck and drove to work. Brooklyn arrived at the video store at approximately 9:55 p.m., wearing a turquoise B & R Video pullover shirt with a polo shirt underneath, light blue jeans and white canvas shoes. Brooklyn was carrying a small

black backpack and was wearing her wedding ring, an opal ring, and a gold bracelet.

Five minutes prior to Brooklyn's arrival, the Defendant entered the store. The Defendant was a large, African-American male with a muscular build, likened to that of a bodybuilder. On this evening the Defendant was wearing a tight black tank top, tan shorts, and white tennis shoes. Liberty testified that the Defendant frequented the video store, and often engaged in conversation with the female employees. The Defendant had a particular interest in Liberty and had constantly asked her out on dates, although Liberty always declined.

At 10:00 p.m., Liberty finished her shift and walked out of the video store, followed by the Defendant. Liberty's car was parked directly in front of the store which was well illuminated by the lights of the video store. As Liberty quickly got into her car, she watched the Defendant walk on towards the Albertson's supermarket. At approximately 12:10 a.m. Brooklyn and co-worker Tabitha Wharton closed the video store for the evening. Brooklyn got into her

gray spotted pick-up truck and was last seen driving through the parking lot in front of the Albertson's supermarket.

Between 5:30 a.m. and 6:00 a.m., Keith Sirevaag, a framing foreman with Maverick Construction, arrived at the Windgate construction site. As Mr. Sirevaag drove towards the site he passed a parked gray spotted Chevy pick-up truck. Before Mr. Sirevaag exited his truck he watched an African-American male, approximately six feet tall, 220 to 230 pounds, with a muscular build, exit from the staircase area of one of the houses under construction. The man was wearing a dark tank top, tan dress shorts, and had a tattoo on his upper right bicep. The man walked within approximately twenty feet of Mr. Sirevaag, got into the gray pick-up truck, and drove off.

Upon exiting his vehicle, Mr. Sirevaag heard noises coming from the house that the African-American male had just exited. Mr. Sirevaag approached the staircase of the house and found a woman, her face covered in blood, and her body bound and gagged. Mr. Sirevaag believed the woman was

still alive and he attempted to get medical help. The woman, later identified as Brooklyn Ricks, died before medical personnel arrived.

Brooklyn Ricks was found wearing a ring and a bracelet, however her wedding ring and black backpack were never located. A sexual assault kit was performed on Brooklyn, who was found wearing her underwear inside out. A trace amount of semen (semen protein P30) was discovered in the vaginal swabs taken from Brooklyn. A used panty liner was located at the crime scene (Brooklyn was menstruating at the time of her demise), and a foreign hair was found in the pubic combing taken from Brooklyn's body.

Dr. Jordan, an assistant medical examiner with the Clark County Coroner's office performed the autopsy on Brooklyn Ricks. He testified that the victim had suffered multiple blunt traumas to the head, neck, and extremities. In addition, there were twelve rather unusual traumas present on the left chest and on the back. According to Dr. Jordan, these wounds could have been made with a screwdriver. Dr. Jordan concluded that Brooklyn Ricks died of a stab wound

to the chest, which penetrated the left lung, and blunt trauma to the head which caused subarachnoid hemorrhage.

Based on information obtained from Liberty Wilson and the video surveillance tape at the B & R Video Store, detectives for the Las Vegas Metropolitan Police Department contacted the Defendant at his home. The Defendant told the detectives that the previous night he had been wearing a white, round-necked t-shirt and sandals. Defendant also told the detectives that the previous night he stopped at the B & R Video Store and left the store around 10:00 p.m. The Defendant then walked to the Albertson's supermarket, bought a beer and donuts, walked around, and eventually returned to the parking lot at the Albertson's supermarket. The Defendant further claimed that he had spent the night at a party with "Robert" and "Ronny." Detectives were never able to corroborate this story. Defendant's father testified that his son left his home, where the Defendant was living, at approximately 9:00 p.m. to 10:00 p.m. on the night of July 14, and returned home at approximately 4:45 a.m. or 5:00 a.m. on the morning of July 15.

On July 16, 1995, a search warrant was served on the Bolin home and detectives retrieved a black tank top, tan shorts, and several pairs of shoes. After the search the Defendant was transported to the Clark County Detention Center where he was photographed, fingerprinted, and a serology kit was collected. The Rick's gray spotted Chevy pick-up truck was located four to five blocks from the Defendant's home with a bloody screwdriver inside. A foreign pubic hair recovered from Ricks' body was microscopically similar to a pubic hair strand obtained from Bolin. Additionally, one out of every 2600 African-Americans would have hair root DNA similar to both the DNA found in Bolin's hair and the DNA found in the foreign pubic hair found on Ricks' body. The Defendant was arrested on July 18, 1995.

B. The Kidnapping and Sexual Assault of Renee Morriss

On April 15, 1975, Renee Morriss (hereinafter "Morriss") and her then-husband John, were both Army nurses stationed in Aurora, Colorado. After finishing their shift at approximately 11:00 p.m., the

couple drove home together and exited their car at the parking spot in front of their apartment. Two young males came out of the bushes, one holding a .22 handgun, and told them to get back into the car. The older-looking male, who was approximately nineteen years old and who was later identified as Bolin, ordered John to drive or he would shoot Morriss. Immediately upon driving off, Bolin demanded money from the couple. While they did not have any cash in their possession, John gave Bolin his wallet and watch, and Morriss handed over her wedding ring. After driving approximately thirty minutes, Bolin forced John to stop the car in a dark and secluded area and then forced him into the trunk of the car at gunpoint.

During the next six hours, Bolin and his accomplice brutally raped Morriss on several occasions at gunpoint. Additionally, at one point in the evening, Bolin forced Morriss to drive to her apartment so that Bolin and his accomplice could rob her and John of their valuables. Morriss and John were eventually able to escape when Bolin forced her to drive to a convenience store and cash a check for one hundred

dollars. While Bolin and his accomplice were occupied in the store, Morriss ran back to her vehicle, drove off, and contacted the police. Bolin was eventually apprehended and pleaded guilty to two counts of first degree kidnapping and two counts of rape. Bolin spent the next thirteen years in a Colorado prison before being paroled in July 1988. In February 1990, Bolin's parole was revoked, and he consequently went back to prison for an additional five years. Bolin was finally released from the Colorado prison system on June 29, 1995, approximately two weeks prior to Ricks' murder.

Prior to trial in the present case, the State filed a motion to admit evidence of other crimes, wrongs or acts that Bolin committed against Renee Morris to show intent, motive, identity, and sexual aberration. Following an evidentiary hearing, the trial judge found clear and convincing evidence that the prior bad acts did occur and that the probative value outweighed any prejudicial effect. Such evidence was then admitted at the trial in 1996 as other bad act evidence for several purposes including a specific emotional propensity for sexual aberration.

ARGUMENT

HARMLESS ERROR ANALYSIS APPLIES TO ERRORS IN ADMISSION OF PRIOR BAD ACT EVIDENCE

Petitioner urges granting of the petition in this case in order to correct an allegedly fundamental error routinely committed by lower courts to subject constitutional errors based on prior bad act evidence to a harmless error analysis. See Petition at p. 12-13. While acknowledging the lower courts are unanimous in application of a harmless error analysis, Petitioner argues such a practice is contrary to this Court's precedents in Sullivan v. Louisiana, 508 U.S. 275, 281-82 (1993) and Neder v. United States, 527 U.S. 1, 11-13 (1999). However, neither Sullivan nor Neder concerned errors in the admission of prior bad act evidence. Sullivan held that the giving of a constitutionally deficient reasonable doubt instruction was not amenable to harmless error analysis because there had been no jury verdict within the meaning of the Sixth Amendment. Sullivan, supra. Neder, on the

other hand, held that a harmless error analysis ***does*** apply to an erroneous jury instruction that omits an element of the offense. Neder, supra. These cases are inapposite to errors in the admission of prior bad act evidence for propensity purposes.

Admittedly, this Court has recognized a limited class of fundamental constitutional errors that "defy analysis by 'harmless error' standards." Arizona v. Fulminate, 499 U.S. 279, 309, 111 S.Ct. 1246 (1991). Errors of this type are so intrinsically harmful as to require automatic reversal (ie., "affect substantial rights") without regard to their effect on the outcome. Id. Such errors have included a complete denial of counsel, a biased trial judge, racial discrimination in selection of grand jury, denial of self-representation at trial, denial of public trial, and defective reasonable doubt instruction. See Neder, supra. However, an error in the admission of prior bad act evidence is not of such magnitude that it produces a fundamentally unfair criminal trial requiring automatic reversal. Where the prior bad act evidence is relevant to particular issues in the case other than just propensity and the probative

value is not outweighed by the risk of unfair prejudice, a harmless error analysis is available.

ADMISSION OF PROPENSITY EVIDENCE IS NOT UNCONSTITUTIONAL

This Court has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith. Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475 (1991). Notably in Estelle, this Court held that the admission of the evidence did not rise to the level of a due process violation because "the prior injury evidence was relevant to an issue in the case" - - "[b]ecause we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." Id. at 75 n. 5, 112 S.Ct. 475.

Recently, the Ninth Circuit in Alberni held that a state court's determination that due process was not violated by the introduction of propensity evidence was not objectively unreasonable. Alberni v. McDaniel, 458 F.3d 860 (9th Cir. 2006). Although the

admissibility of evidence is generally a matter of state law, the Alberni Court recognized that the admission of prior bad act evidence for propensity purposes may violate federal due process if it renders a trial fundamentally unfair. However, under the facts of the particular case the lower state court's conclusion that the propensity evidence did not violate due process was not an unreasonable conclusion.

In 1995, the Federal Rules of Evidence were amended to enlarge the admissibility of prior bad act evidence in sexual assault and child molestation cases including for purposes of showing propensity:

> In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

Fed.R.Evid. Rule 413.

> In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

Fed.R.Evid. Rule 414.

The Tenth Circuit rejected a due process challenge to Rule 413 because propensity evidence still can be excluded whenever its prejudicial effect substantially outweighs its probative value. United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 202 (U.S. 1998). Assuming the prior offenses are relevant, Rule 413 allowing admission of evidence of similar crimes in sexual assault cases supersedes Rule 404's prohibition against admission of character evidence. United States v. Crawford, 413 F.3d 873 (8th Cir. 2005). Likewise, in child molestation cases, admission of prior bad acts for purposes of demonstrating character under Rule 414 does not violate a due process right to a fundamentally fair trial when such evidence is relevant but not overly prejudicial. United States v. Castillo, 140 F.3d 874 (10th Cir. 1998). The test under which the probative value of evidence is balanced against its prejudicial effect ensures that evidence which might jeopardize the right to a fair trial will be excluded. Id.; see also United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001).

THE PRIOR BAD ACT EVIDENCE WAS RELEVANT FOR PURPOSES OTHER THAN PROPENSITY

As in Estelle v. McGuire, supra, the prior bad act evidence used against Bolin was relevant to issues other than just propensity for a sexual aberration. The trial judge first noted many similarities between the sexual assault of Renee Morriss and that of Brooklyn Ricks:

> There is a very similar time frame near midnight to 3, 4:00 in the morning. There is evidence in both cases of an abduction utilizing the victim's own vehicle. Both involved brutal and forcible rapes. Both involved - - there is evidence to suggest that laying await was the means by which the victims were accosted.
>
> The threats of death in the case involving Ms. Morriss do create a remarked similarity to this case. The difference in the instant prosecution is that the victim did not manage to escape.

8 ROA 55. The trial judge then ruled that the prior kidnapping and rape of Renee Morriss would be admissible, "particularly given the fact that there is a very vigorously litigated issue of ***identification*** in this

prosecution." Id. The judge also ruled the evidence was admissible to prove motive, intent, and knowledge. 8 ROA 56. In addition to limiting instructions contemporaneously given with the prior bad act testimony, Bolin's jury was formally instructed as follows:

> Evidence of a person's character or a trait of his character or evidence of other crimes, wrongs or acts, is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.
>
> However, such evidence is admissible for other purposes, such as proof of motive, intent, knowledge, or identity, and as evidence that the person possesses a specific emotional propensity for sexual aberration.

5 ROA 1166 (Jury Instruction #21). With the exception of the last phrase concerning "a specific emotional propensity for sexual aberration," the instruction parallels NRS 48.045 as well as Rule 404 of the Federal Rules of Evidence.

The prosecutor argued to the jury that the Defendant's conduct in 1975 for sexually assaulting a woman at gunpoint in a remote location after locking her husband in the trunk of a car constituted aberrant

sexual behavior. 51 ROA 168-72. The prosecutor then argued that this aberrant sexual behavior was relevant to show the motive, intent, knowledge and ***identity*** of the perpetrator for the sexual assault in the instant case. Id. But at no time did the prosecutor ever argue or suggest that just because the Defendant had raped before, that he must have raped again. The prior sexual assault evidence was not simply used as character evidence to show conformity, but instead was properly admitted and argued to show motive, intent, knowledge and identity.

On direct appeal, the Nevada Supreme Court agreed with the trial judge that there were numerous similarities justifying admission of the prior bad act evidence to show ***identity***:

> An analysis of the similarities between these two crimes reveals a common ***identity***. In both, young white women of similar age, complexion, and build were abducted in their vehicles late at night, their wedding rings and other valuables taken, and their vehicles used to secret them to remote locations where they were subjected to brutal sexual assaults. Because of the similarities between the two crimes, we conclude that the district court did not err in admitting evidence of Bolin's prior rape and kidnapping convictions for the purpose of establishing ***identity*** pursuant to NRS 48.045(2).

Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998). Notwithstanding the instruction regarding a "specific emotional propensity for sexual aberration," the prior bad act evidence was properly admitted and considered for non-propensity purposes, namely to show identity.

THE PROBATIVE VALUE OF THE PROPENSITY EVIDENCE OUTWEIGHED ANY UNFAIR PREJUDICE

In 1978, Nevada recognized "emotional propensity" as a narrow exception for the admission of prior bad act evidence in cases involving sexual aberration. McMichael v. State, 94 Nev. 184, 577 P.2d 398 (1978) (Admission of prior and subsequent acts of oral copulation between defendant and 13-year old victim were properly admitted). The court reasoned that certain sex crimes were widely recognized as stemming from a "specific emotional propensity for sexual aberration":

> The fact that in the near past one has given way to unnatural prochivities has a direct bearing upon the ultimate issue whether in the case being tried he is guilty of a particular unnatural act of passion. The importance of establishing this fact far outweighs the prejudicial possibility that the jury might convict for general rather than specific criminality.

Id. The court agreed that such evidence was relevant to prove intent or the absence of mistake or accident which was put in issue by the not guilty plea. Id. The court further noted that such evidence was subject to exclusion if the prejudice outweighed the probative value and that the exception did not apply to "mere criminal propensities in general, but rather to specific sexual proclivities." Id.

That same year the exception was extended in a child lewdness case to prior sex acts with persons other than the current victim which had occurred several years earlier. Findley v. State, 94 Nev. 212, 577 P.2d 867 (1978). The challenged testimony was received with a limiting instruction to prove intent, or the absence of mistake or accident after balancing prejudice and probative value. Id. This was the Nevada law in effect in 1996 when Defendant's trial was held in the present case.

Not until 2002 did the Nevada Supreme Court repudiate the legal proposition stated in McMichael that evidence showing an accused possesses a propensity for sexual aberration is relevant to the

accused's intent. Braunstein v. State, 118 Nev. 68, 40 P.3d 413 (2002). In so doing, the court affirmed that the prior acts of child molestation at issue in Braunstein were nonetheless properly admitted because the acts were established by clear and convincing evidence, were relevant to prove a common scheme or plan, and were not substantially outweighed by the danger of unfair prejudice. Id. The court in Braunstein saw the sexual aberration approach as a carry-over from common law that should not have survived adoption of the evidence code, specifically NRS 48.045(2), which reads as follows:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

NRS 48.045(2). The concern in Braunstein was that McMichael and Findley appeared to hold as a matter of law that prejudice is always outweighed by relevance whenever other act evidence of sexual aberration is considered for admission. The Braunstein

court affirmed that the only appropriate analysis for the admission of prior bad acts is within the parameters of NRS 48.045(2) and weighing of the probative value against the risk of unfair prejudice. Braunstein, supra.

When considering the retroactive effect of the Braunstein case, the Nevada Supreme Court held as follows:

> The new rule in Braunstein simply interprets NRS 48.045(2), an evidence statute concerning the admissibility of prior bad acts. ***This is clearly an issue of state law***, and does not derive from the United States Constitution.

Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002) [emphasis added]. The Richmond court also held that Braunstein announced a new rule that had no retroactive effect to cases which were already final on direct appeal. Id. Although the prior bad act evidence was improperly admitted in Richmond, a majority of the court agreed that motive could be a valid basis for admission of prior act evidence in child sex abuse prosecutions to show a defendant's attraction to or obsession with his victims.

> Evidence of separate acts of pedophilia or other forms of sexual aberration are not character evidence, but are admissible for the "other purpose" [under NRS 48.045(2)] of explaining why a crime of sexual deviance was committed. The mental aberration that leads a person to commit a sexual assault upon a minor child, while not providing a legal excuse to criminal liability, does explain why the event was perpetrated.

Id. at 939 n. 14, 59 P.3d at 1259 n. 14 (Maupin, J., concurring in part and dissenting in part). It therefore remains the law in Nevada that whatever might "motivate" one to commit a criminal act, including a sexual aberration, is legally admissible to prove motive under NRS 48.045(2) so long as the evidence is established by clear and convincing evidence and the probative value outweighs the risk of unfair prejudice. Ledbetter v. State, 122 Nev. 252, 129 P.3d 671 (2006).

In the present case, evidence of Bolin's prior kidnapping and rape of Renee Morriss was established in a pre-trial hearing by clear and convincing evidence. See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985). The trial judge further ruled that the probative value of such evidence outweighed any prejudicial effect. Consistent with federal precedent discussed

above, due process is not a per se bar to propensity evidence. Where the evidence is relevant to issues other than propensity and the prejudicial effect is outweighed by the probative value, fundamental due process and the right to a fair trial are not effected.

ANY ERROR WOULD HAVE BEEN HARMLESS

The admission of the prior bad act evidence in this case, even for propensity purposes, was not a constitutional error. Contrary to Petitioner's claim, the Nevada Supreme Court has never held that Bolin's direct appeal was erroneously decided under the law in existence at the time. Rather, in Braunstein, supra, it departed from the precedent relied on in Bolin's direct appeal and then in Richmond, supra, held that Braunstein's change in law was not retroactive. A change in law with no retroactive application does not render prior rulings erroneous.

In affirming denial of post-conviction relief, the Nevada Supreme Court held that even if the change in state law were retroactively applicable to Bolin's case, the evidence would have still been admissible to show identity and any error was harmless in light of the

weight of evidence supporting Bolin's conviction. See Petitioner's Appendix at p. 3a. Thus, even if Bolin were correct that harmless error analysis should not apply to the admission of propensity evidence, Bolin would still have to show that the propensity evidence was erroneously admitted and that he is entitled to retroactive application of the change in state law.

In his Petition, Bolin repeatedly emphasizes the circumstantial nature of the evidence against him and suggests the evidence was weak. This is contrary to the findings of the court below. In holding that any error would have been harmless, the Nevada Supreme Court considered the weight of the evidence supporting Bolin's conviction:

> That evidence included Bolin's history of frequenting the victim's place of work and asking the victim and her sisters out on dates; surveillance videotape placing Bolin at the victim's place of work minutes before she arrived and approximately two hours before she departed on the night of her death; a witness who saw Bolin drive away from the crime scene in the victim's truck just before the witness discovered the dying victim; the victim's truck being found five blocks from Bolin's home with a bloody screwdriver inside; and evidence that Bolin was included among the one in every 2,400-2,600 African-Americans who could have been the donor of DNA evidence found on the victim's body.

See Petitioner's Appendix at p. 3a. Considering the weight of this evidence, it is clear beyond a reasonable doubt that the jury would have found Bolin guilty absent the prior bad act evidence. The evidence was properly admitted for purposes of identity and its probative value outweighed any unfair prejudice. Thus, any error in the jury considering the bad act evidence for propensity purposes would have been harmless.

CONCLUSION

Federal law does not prohibit the consideration of propensity evidence when also relevant to particular issues in the case such as identity. Safeguards such as the weighing of probative value against the risk of unfair prejudice and establishment of the prior bad acts by clear and convincing evidence adequately protect constitutional due process rights. Nevada's departure from the sexual aberration precedent is purely a matter of state law and is not retroactive to Bolin's case.

Nevada's harmless error analysis did not concede error in the admission of propensity evidence in Bolin's case, but simply concluded that if the change in law did apply any error would have been harmless. Bolin has presented no federal issues here warranting certiorari relief by this Court.

DATED this 24th day of January, 2008.

Respectfully submitted,

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